For Your Benefit

A newsletter on current legal issues impacting employee benefits and executive compensation

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IRS and DOL Issue Guidance on *Windsor* Decision and Employee Benefit Plans

By Susan Foreman Jordan and Pauline W. Markey

In its decision in *United States V. Windsor*, handed down on June 26, 2013, the U.S. Supreme Court held that Section 3 of the Defense of Marriage Act is unconstitutional because it violates the principles of equal protection. While this decision was monumental, the Supreme Court did not address Section 2 of DOMA, which provides that no state is required to recognize a same-sex marriage that was (legally) performed and recognized in another state.

Consequently, for the last three months, many same-sex couples and their employers have been left in a quandary. Consider the same-sex couple who were married legally in one state, but now are domiciled in a state that does not recognize same-sex marriage. Now, add the complication that at least one of the parties works in the state in which the couple resides, but all benefit programs are administered in a third state, where the employer's home office is located, and that recognizes same-sex marriage. Which state law controls?

Fortunately, the IRS just resolved these concerns, at least insofar as federal tax matters and ERISA-governed employee benefit plans are concerned, in Revenue Ruling 2013-17 and two sets of Frequently Asked Questions, all of which became effective as of September 16, 2013. The guidance makes it clear that a same-sex marriage that is valid in the **place of celebration** (whether that be a state or a foreign jurisdiction having the legal authority to sanction marriage) will be recognized, regardless of the domicile of the parties. The terms spouse, husband and wife will be defined on a gender-neutral basis, for all federal purposes, to refer to individuals who are lawfully married under state law.

This guidance further confirms that the term "marriage" does not include registered domestic partnerships, civil unions or other similar formal relationships recognized under state law that are not denominated by that state's law as marriage. As such, the terms spouse, husband and wife do not include individuals who have entered into such a formal relationship. This is the case whether the parties are of the same or opposite sex.

The guidance provided by the Revenue Ruling is to be applied prospectively. However, affected taxpayers are permitted to rely upon it for the purpose of filing original, amended or adjusted returns and/or claims for credit or refund for overpayments of tax resulting from these changes, provided that the applicable statute of limitations has not expired. The IRS made note in the Revenue Ruling that it expects to issue further guidance, specifically with regard to employee benefits and employee benefit plans, pertaining to potential consequences of retroactive application of the new law and to provide plan sponsors with sufficient time for plan amendments and any necessary corrections.

In addition to the recently issued IRS guidance, the Employee Benefits Security Administration (EBSA) division of the Department of Labor also issued its own guidance on September 18, 2013. Fortunately, EBSA has adopted an identical position to the IRS that a same-sex marriage that is valid in the state of celebration will be recognized notwithstanding the residence of the parties. This makes for a clear, consistent policy among the government agencies governing employee benefits.

So, what does all of this mean for employee benefit plans and for the employers that sponsor them?

1. First and foremost, employers should review their plan documents to identify any nonconforming definitions of marriage, spouse, husband and wife. That said, it is probably a good idea to defer amending plan documents until the IRS has set clear guidelines for amendment deadlines and effective dates.
2. Plans should be administered and operated, beginning immediately, to comply with the new law, by extending spousal rights and spousal benefits on a gender-neutral basis, even though plan documents haven't yet been amended. This applies to all benefits, including group health plans of all types, flexible spending accounts and group insurance programs.
3. Keep in mind, that while benefits provided to domestic partners generally

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remain taxable, health insurance and other benefits provided to spouses (whether of the same or opposite sex) are not, so payroll protocols must be adjusted.

4. Qualified retirement plans, in particular, are affected by the new law. Same-sex spouses now will be automatic death beneficiaries (unless appropriate spousal consent is secured) and will be eligible for spousal rollover of benefits. The financial needs of same-sex spouses must be taken into account under the 401(k) hardship withdrawal rules, and same-sex spouses or former spouses may obtain rights as alternate payees under qualified domestic relations orders. Plan participants should be made aware of these changes and should be encouraged to review their beneficiary designations and revise them as appropriate.
5. Some authorities have suggested that plan administrators should request proof of marriage before accepting a new beneficiary designation or claim for benefits. While, to a large extent, this is a matter of personal preference and administrative feasibility, we strongly recommend that documentation request policies be developed and administered objectively, consistently and with sensitivity.

6 Watch for the additional guidance promised by the IRS!

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Reminder: Health Care Exchange Notification Required by October 1, 2013

By Daniel N. Kuperstein

Under temporary guidance issued May 8, 2013, by the U.S. Department of Labor (DOL), beginning no later than October 1, 2013, employers must give a written notice to each employee (regardless of the employee's plan enrollment status, if applicable, or of part-time or full-time status), providing information about coverage options under the state and federal health benefits exchanges (referred to as "the Health Insurance Marketplace" or "Marketplace").

The Marketplace, designed to expand access to affordable health care coverage, is the program implemented by the Patient Protection and Affordable Care Act (PPACA) that provides a "one-stop shopping" experience that allows for easy comparison of health insurance options in the private health insurance market.

Under PPACA, the notice must inform employees of three things:

1. It must inform them of the existence of the Marketplace, including a description of the services provided by the Marketplace and the manner in which the employee may contact the Marketplace to request assistance;
2. If the employer plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs, that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Marketplace; and
3. If the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.

The notice deadline of October 1, 2013, is the date when "open enrollment" begins for coverage through the Marketplace. For new employees, effective October 1, 2013, employers must provide the notice at the time of hiring. For 2014, if the notice is provided within 14 days of the employee's start date, then the DOL will consider the notice to be provided at the time of hiring.

The notice must be provided to employees in writing and at no charge to the employees. Further, the notice may be provided by first class mail, or alternatively, it may be provided electronically, as long as the requirements of the DOL's electronic disclosure safe harbor are met.

To assist employers with complying with the notice requirement, the DOL has provided on its website two model notices that meet the notice content requirements discussed above: (1) the model notice for employers that do not offer a health plan, available at: www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf., and (2) the model notice for employers who do offer a health plan to some or all of their employees, available at: www.dol.gov/ebsa/pdf/FLSAwithplans.pdf. Employers are allowed to use one of these models, as applicable, or a modified

version, provided that the notice meets the content requirements above.

The same temporary guidance discussed above also announced an updated model election notice that health plans must provide to inform employees about continued health care coverage under the COBRA. The election notice, which describes the rights of employees to continuation coverage and how to make an election, must be provided to qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event under COBRA. The language of the election notice was updated to incorporate changes made by the PPACA. The model election notice is available in modifiable, electronic form on the DOL's website at www.dol.gov/ebsa/cobra.html.

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